

## Guidance Notes for Financial Advisers

### Trust Pour Overs and Transfer of Trusteeship

#### Introduction

Financial advisers are often confronted with having to give advice on the transfer of assets from an offshore trust to another offshore vehicle to evolve the financial planning requirements of clients, or to restructure existing arrangements for some reason.

On the face of it, the process seems straight forward, but achieving the desired outcome can be time consuming, onerous and even costly.

Therefore, the following guidance notes have been developed to assist advisers with the process, of when an Overseas Trust and Pension ("OTAP") product is the recipient of an offshore trust's assets. This guidance further reflects OTAP's policy in respect of both trust Pour Overs and the Transfer of Trusteeship. A detailed step by step practical Adviser Guide to Pour Overs is also included with this guidance for you and your client's convenience.

*Practice Note: OTAP strongly recommends that clients get independent tax and other advice in relation to a Pour Over before commencing the transaction.*

#### 1. Trust Pour Overs

##### 1.1. Stages to a Pour Over

There are essentially four stages that need to be worked through in order to complete a Pour Over which are: -

- Preparing for the Pour Over
- Setting up an OTAP product
- Initiating the Pour Over
- Finalising the Pour Over

The step by step practical Adviser Guide provides a practical and detailed walkthrough of the stages and steps needed to complete the Pour Over.

##### 1.2. Overview of a Pour Over

The concept of a 'Pour Over' is the transfer of assets from one trust to another or similar structure such as an international retirement plan like OPES. The reasons and benefits of the Pour Over will differ based upon each individual set of circumstances, however, the main feature of a Pour Over transaction is that the assets in the trust are not distributed back to the client, but directly to the 'new structure'.

To facilitate this the 'new structure' must be appointed as a beneficiary under the existing trust, following which the current Trustees make a distribution of assets to the 'new structure' by way of cash transfer, In-specie transfer, assignment of assets or a combination thereof.

##### 1.3. Parties to a Pour Over

The parties will be the existing Trustees, the settlor (if still alive) and the beneficiaries of the existing trust, together with the Trustees of the 'new structure' and you the financial adviser. Each party has a role to play if the Pour Over is to progress smoothly and the desired outcome achieved.

#### 2. Guiding Principles for Undertaking a Pour Over

##### 2.1. Preparing for the Pour Over & Assessment

The first step is to establish whether the existing trust and Trustees will permit the Pour Over in the first place or if they will impose any specific conditions or restrictions. To understand this the following needs to be ascertained at outset: -

- The deed needs to be reviewed to establish if the 'new structure' can technically be appointed as a beneficiary. There is often a clause in the Trust Deed that deals with the addition of beneficiaries with a schedule of specifically excluded beneficiaries. Most trust deeds will permit a trust or trust based vehicle to become a beneficiary, but there may be exclusions or restrictions. If these exist, it is unlikely that the existing Trustees will consent to the appointment of the 'new structure' as a beneficiary. In this instance, the trust may need to distribute to the beneficiary who in turn will use the funds to set up the OTAP product

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- It is important to establish if there are any existing beneficiaries and if distributions have been made to these beneficiaries under the existing trust. This is important as the incumbent Trustees must ensure that any decisions made considers all beneficiaries and that this can have a material impact on the extent of the Pour Over

Generally, the client will know the makeup of beneficiaries if they are the settlor of the original trust. If they are a beneficiary and not the settlor, they may not have any insight to who the other beneficiaries are, as trust law does not typically require a trust to disclose such information

The existing Trustees will generally want to ensure that the 'new structure' will not disadvantage any of the existing beneficiaries. The only party that can make a decision on this is the existing Trustees themselves and they may refuse to Pour Over on these grounds

**For Example:** Trust Z has two beneficiaries, A & B, with neither one being subordinate to the other. Beneficiary A requests that an OPES Retirement Plan be established as a beneficiary of Trust Z and for the trust to distribute all its assets to the new OPES

The Trustees may refuse to do this as it could disadvantage beneficiary B, unless beneficiary B gives their consent or the Trustees may consent to only 50% of the assets to be transferred

**Practice Note: If other beneficiaries are present and situations where the trust has or is providing some form of support such as income or maintenance payments, it becomes more complex and it is unlikely that the existing Trustees will facilitate the Pour Over unless all beneficiaries give written consent to the transaction via a Letter of Wishes ("LOW"). Such consent will be to mitigate any future liability the Trustees may have by facilitating the Pour Over**

- In order to liaise with the existing Trustees, it becomes vital that you as the adviser have the necessary authority to do so. This authority is usually given by the settlor or the beneficiaries. Without this the Trustees have no obligation to engage with you and in most instances, will not

## 2.2. Communication

Communication between all parties is vital. It is very easy for the client or the existing Trustees to not fully understand the nature of the transaction. Therefore, clear communication between all parties is vital.

The client, as settlor or beneficiary (or you as appointed adviser), should contact the existing Trustees by telephone to notify them of what the client is looking to do. e.g. a) request the appointment of a pension plan as a beneficiary of which the settlor/beneficiary is the member and b) for a subsequent distribution from the trust to be made into the 'new structure' as their needs have changed and that they will be writing to the Trustees on that basis.

**Practice Note: This should only be done once the client is clear on the nature of the transaction.**

When making the initial contact with the current Trustees, it is important to get confirmation from the Trustees on the following: -

- The existing deed does not exclude products such as OPES from being appointed as a beneficiary
- Ascertain the extent of a possible distribution and any prohibitive matters
- Confirm what is required by them to facilitate this e.g. LOW, permissions by other beneficiaries, confirmation of membership to the OTAP product etc
- Confirm or notify the Trustees of your appointment as the adviser
- Get the full contact details for the person with whom liaison will take place for future reference and correspondence

Subject to a favourable response and with knowledge of any additional requirements the client should prepare a LOW, but **only send it to the Trustees once the OTAP product number has been issued.** The OTAP product needs to be in existence when the LOW is submitted to initiate the Pour Over. An example of such a letter can be found below.

The existing Trustees will then respond to the LOW and commence the Pour Over or raise any matters that need addressing.

**Practice Note: At this stage, the existing Trustees have no obligation to, and quite often will not, talk to the Trustees who are due to receive the funds i.e. OTAP. Therefore, once the LOW has been submitted to the current Trustees, the adviser is responsible for making regular contact with the exiting Trustees to follow up and ensure that the OTAP product is appointed as a beneficiary of the trust and that the transfer of assets can begin. Only once this appointment has been made will the existing Trustees communicate with OTAP.**

## 2.3. Asset Types, Loans and Pour Overs

Many trusts were set up by way of a loan. In other words, the trust has a debt obligation to repay the loan at some future point. If all the trust assets are to be poured over to the OTAP product, then the loan will need to be dealt with by the existing Trustees, as it cannot be poured over to the OTAP product.

Depending on the nature of the loan, the specific circumstances around it and the lender these loans can be repaid or written off. However, the existing Trustees will need to establish which route to take when dealing with the any loans to the trust.

**Practise Note: When a Pour Over is instructed, which will result in the closure of the trust, the Trustees are generally liable to repay any outstanding loans. This loan is a liability and liabilities cannot be poured over into a foreign**

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*retirement plan. Hence any outstanding loan needs to be dealt with as a separate transaction prior to the Pour Over by the existing Trustees. Depending on the nature of the loan/s the Trustees will have two options open to them a) repay the loan in full b) write-off the loan. Any loan paid out to a beneficiary and is written off or partially written off, then that amount written off counts as a distribution to that individual as of the date written off and becomes reportable under Common Reporting Standards ("CRS"). The option chosen by the existing Trustees will be driven by what is possible and the implications of each, which in many instances will require the Trustees seeking independent tax and or legal advice or requesting the adviser to obtain such advice to make a decision.*

A loan from the trust to a connected party such as an investment holding company can be transferred under a Pour Over as it is an asset to the trust but this requires specific consent by OTAP and will introduce an additional level of complexity, which will result in time charges.

Most investment assets such as collective investments, stocks and shares and offshore bonds can be transferred In-specie. Ensuring the right process and paperwork is critical. As the adviser, you need to provide OTAP with specific guidance as to the way the assets are to be transferred e.g. the assignment of an offshore bond or In-specie transfer of shares etc. and that the exiting Trustees understand these requirements and have obtained all the relevant documentation from 3rd party investment or bond providers. Please note assignments and In-specie transfers can take a considerable time to complete.

Real estate and other physical assets like gold can only be poured over if held in a special purpose investment company and will be subject to that company's articles of association or memorandum of incorporating. If there are other shareholders in the investment company, then consideration and consent typically needs to be given by the other shareholders and any shareholder agreement also needs consideration. Investments of this nature need to be considered by OTAP before consent can be given and full information should be provided as early as possible.

## 3. Governance, Regulations and Compliance

### 3.1. Trustee Responsibility & Timelines

The exiting Trustees have a legal duty of care to all beneficiaries and this can lead to them asking a wide range of questions before agreeing to the transaction. In addition, the exiting Trustees will have to deal with a number of administrative tasks. These tasks vary from passing the necessary resolution to appointing the OTAP product as beneficiary and drafting supporting instruments and warranties to facilitate the transaction.

The existing Trustees will also need to agree to the Pour Over, finalise and execute the relevant documentation, appoint the OTAP product as beneficiary and undertake the transfer of the assets to OTAP, which may be a combination of cash transfer, asset assignment and or In-specie transfer.

These administrative tasks can be time consuming, chargeable and onerous depending on the complexity of the trust and its holdings. **Advisers should manage clients' expectations in terms of time to completion as the process can become protracted and rests with the exiting Trustees and not OTAP.**

*Practice Note: Ask the existing Trustees for an expectation of how long they foresee the transfer process taking and what can be done to expedite matters. The client should be informed of the expected time frame, steps to be taken and reminded that the nature of these transactions are complex and there could be unforeseen delays, which should be expected where the trust holds several different asset types.*

### 3.2. Compliance Requirements

Trust Pour Overs resulting in a Mirror Trust or other products with OTAP require Source of Wealth ("SOW") and Source of Funds ("SOF") together with Customer Due Diligence ("CDD") and Know Your Client ("KYC") on the trust and the individual applying for the OTAP product. This is because the assets are owned by a 3rd party i.e. the trust and not the applicant of the product, albeit the product applicant may have established the trust in the first instance.

Where a Pour Over from a trust is the SOF for an OTAP product, the following CDD is required:

- Full and complete Trust Deed with all the amendments
- If an Appendix C Business where the Trustees are a corporate entity proof of existence and proof of regulation need to be provided. Please refer to our AML guidance in respect of Appendix C Businesses

In this case where the Trustees are regulated but not within an Appendix C Business, then one has to still collect the evidence of regulation and proof of existence plus the following:

- Full and complete Trust Deed with all the amendments
- Certificate of Incorporation
- Articles
- Certificate of Good standing or latest audited financials
- Register of directors
- Register of shareholders
- Identification and Verification ("ID&V") for the directors and any ultimate beneficial owners who own 25 % or more of the trust
- Full knowledge of assets and where they are held (custodian and nominee/Special Purpose Vehicle). Financials should be sought for the trust
- Similarly, to the above obtain the relevant documentation on the nominee vehicle holding the assets unless the nominee is wholly owned and controlled by an Appendix C Business. Declarations of trust will be required to show the assets held in a holding/nominee vehicle are for the trust where it is not on a share register

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In all instances OTAP needs to know the origin and party/s who settled the original assets, what was the source or means of this funding trust.

## 4. Transfer of Trusteeship

### 4.1. Overview

Transfer of Trusteeship is the process where one set of Trustees retire and a new set of Trustees are appointed. Under such an action, the actual trust remains in place and the change in Trustee has no bearing on the deed or purpose of the trust. This action is often taken where the beneficiaries are unhappy with the existing Trustees or the beneficiaries want to consolidate the management of structures with a single product provider.

### 4.2. Legal Implications

Transferring Trusteeship has increased with the expansion of the international trust market, with trusts being offered from many jurisdictions. Changes to Trustees can result in a trust being in one jurisdiction but Trustees in another. This creates complexity due to the different governing trust laws and can become problematic.

Where Trusteeship is transferred the newly appointed Trustees take on the liabilities associated with the existing trust which may be latent and only come to the fore in many years' time. The retiring Trustees will require an indemnity from the incoming Trustees against any future claims.

The legal risk of transfer of Trusteeship therefore becomes significant given that the incumbent Trustees are liable for the historic Trustee actions and in many cases cross boarder complexity due to multiple jurisdictions. Consequently, litigation in respect of trusts has increased.

**Practice Note: OTAP has made the policy decision not to take on the risk associated with transferring Trusteeship.**

### 4.3. Introducing the Mirror Trust

To overcome these issues OTAP offer a Mirror Trust solution. Under this arrangement, a new trust is set up via our Portfolio Trust product which the client needs to apply for. The Mirror Trust is established using the same name and mirrors the existing trust in terms of its purpose and beneficiaries.

The Mirror Trust is then funded by pouring over the assets from the historic trust. The process and transfer of assets would follow the Pour Over guidance above.

**Practice Note: Attention needs to be given to the assets, existence of loans, the ability of the deed to allow the distribution of funds to the Mirror Trust and other key points already covered above. The governance process, waivers and indemnities also follow those already highlighted.**

**A Mirror Trust is actually known as a flip-flop and will only work at the entire discretion of the Trustees, otherwise there will have a tax event regarding capital gains. These have to be done very carefully with proper tax advice.**

## 5. Adviser Aid & Check List – Stages & Steps to Be Followed in A Pour Over

The following check list and steps have been compiled to assist you in managing the part of the process that requires your involvement. Following these steps will speed up the process, ensure clients expectations are managed and help achieve the desired outcome in an efficient manner.

We recommend you keep a copy of this check list on your client file and use it to ensure the steps are followed and as a quick guide to progress.

*Note: No discounts will be provided for Advanced Plus products.*

1. Preparing for the Pour Over	Completed
a. Analyse the Trust Deed to ascertain if an OTAP product can be added as a beneficiary.	
b. Obtain authority from the client to liaise with his current Trustees.	
c. Communicate with current Trustees as per guidance notes and establish if Pour Over can be done and if the Trustees have any objections or conditions.	
d. If there are objections raise these objections with a Fiduciary Specialist in OTAP to establish if they can be overcome.	
e. Brief your client in full as to how the process will unfold and what is required of them.	

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2. Setting up an OTAP product	Completed
a. Complete OTAP's application documents.	
b. Provide full CDD, SOF and SOW on the Trust, its assets and the applicant as per OTAP published guidance on CDD. <b>NOTE: Please include full contact details for the existing Trustees.</b>	
c. Provide detailed Memo to OTAP as to circumstances of the Pour Over (details of Trustees, list of assets to be transferred, amounts and a complete history as where the original wealth originated from etc.)	
d. Clearly identify how each individual asset is to be transferred to OTAP e.g. cash transfers, assignment of an offshore bond, in-specie transfer or combination.	
e. Liaise with the relevant holder of the investment or offshore bond issuer so that its clear what documentation and process they require to transfer or reassign that relevant assets to OTAP. <b>NOTE: This needs to be communicated to both the existing Trustees in the LOW when instigating the Pour Over but from a practical point, you should have this conversation with the exiting Trustees to avoid misunderstandings and delays or a failed transaction.</b>	
f. Draft a copy of the LOW which your client will be sending to the Trustees to instigate the Pour Over to OTAP and provide to a copy to OTAP.	
g. Wait for OTAP to sign off the application and issue an OTAP product number and payment details. If assets are to be transferred In-specie into an offshore bond a bond number or account number with an investment platform or custodian.	

3. Initiating the Pour Over	Completed
a. Send the LOW to the current Trustees as per the Guidance notes to appoint the OTAP product as beneficiary. Provide clear guidance to the existing Trustees, via a LOW from the beneficiaries, as how each asset is to be dealt with i.e. disinvested, transferred, assigned etc.	
b. Keep in regular contact with the Trustees to ensure that the OTAP product gets appointed as beneficiary	
c. Advise OTAP once the OTAP product has been appointed as a beneficiary. <b>NOTE: many Trustees will issue a Deed of Appointment, which will require OTAP to sign and seal to accept the beneficial appointment.</b>	
d. Following the appointment as beneficiary, the exiting Trustees may also require OTAP to sign a declaration or other such authority including legal waivers and indemnities before they commence the physical transfer of assets. These are key legal processes the exiting Trustees typically undertake and add time to the process but are a requirement. <b>NOTE: correct execution of such documentation is critical to ensure the transfer of assets and ownership to OTAP. Hence this part of the process can take time given the care that is required in respect of the documentation and may result in time charges being applied to the case. OTAP will need to review and approve any such documents.</b>	

4. Finalising the Pour Over	Completed
a. Once the assets have been poured over and invested in an OTAP product you may need to advise the Trustees to either collapse the Trust or remove your client as a beneficiary if this has not been done.	
b. OTAP will issue the Welcome Pack and Investment Certificate only on completion of the transfer of all assets, which includes a reconciliation and posting of all transferred assets to the client's OTAP product. <b>NOTE: Where a Pour Over is complex and consists of multiple assets, which may include private equity, it may only be possible for OTAP to complete this final stage several months after the original application. As the adviser, you must manage the client's expectations in this regard so they understand the complexity and time lines to avoid unnecessary queries which can arise when clients are not aware of the detailed process.</b>	

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## 6. Example of a Pour Over Letter of Wishes

The following template letter can be used to make a Pour Over to an OTAP product and should be edited based on each specific case.

There is no right way of doing this and in some instances this process may be undertaken in two steps: a) issuing a LOW simply to appoint the OTAP product as a beneficiary with a subsequent LOW requesting a distribution post the appointment of the OTAP product as beneficiary or b) a LOW covering the appointment and distribution request.

The extent of the LOW will need to be considered based on the factors covered in these guidance notes and in consultation with your client who will know the Trustees.

*Date: 01 January 2017*

*Attention: ABC OFFSHORE TRUST COMPANY, as Trustees of The XYZ Trust*

### **Re: The XYZ Trust – Addition of new beneficiary to Trust.**

*Without fettering the discretion of the Trustees in any way, I would like the following wishes to be considered. Having taken independent legal and tax advice, I would like the Trustees to consider appointing the following international retirement plan, of which I am the sole member, as a beneficiary to the XYZ Trust.*

#### **New Beneficiary:**

*[OPES International Retirement Plan 00/123]*

*Address: Overseas Pensions and Benefits Limited, 2nd Floor, Elizabeth House, Les Ruettes Brayes, St Peter Port, Guernsey, GY1 1EW.*

*Contact: +44 (0) 20 8209 9251*

*Email: 'Jane Grassie FinstAM, Cert PMI' Jane.Grassie@trustandpension.com*

*As I have reached a point in my life where my focus has shifted to securing my financial future in retirement for myself and my family. With the guidance of the specialised advice I have sought from my financial adviser, [Mr/Mrs/Ms X of DEF Advisors Ltd (registered South African FSP – FSB 010101), I have decided that an International Retirement Plan provides a far better arrangement in terms of distributions from the above trust, rather than to me personally. For this reason, kindly consider my wishes to nominate such as beneficiary.*

#### **Distribution:**

*Should this appointment be approved by the Trustees please further consider making a distribution to the named plan by way of assigning the offshore life bond, held in the trust, in full to the retirement plan referenced above.*

#### **Adviser Appointment:**

*Should you require additional information, kindly contact my appointed financial adviser, [Mr/Mrs/Ms X] who is guiding us in these matters or alternatively myself on the below contact details:*

- Mr/Mrs/Ms [X of DEF Advisors Ltd]: [telephone number and email address]*
- Mr Smith, as beneficiary of the XYZ Trust: [telephone number and email address]*

*Please also make any documentation available to [Mr/Mrs/Ms X] in the same way you would to me as beneficiary.*

*This request is my expression of wishes and in no ways fetters your role or discretionary powers as Trustees and I ask your kind consideration in these matters.*

*Sincerely,*

**Mr. A Smith, beneficiary**

**[Insert Passport or ID]**

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## 6. Example of a Pour Over Letter of Wishes continued...

*Practice Note: If there are multiple beneficiaries then this letter will need to include a statement from the other beneficiaries consenting to the transaction and carry their signatures.*

*"We x,y and z are beneficiaries of the XYZ Trust and hereby consent to the distribution outlined in the above LOW and warrantee to the Trustees that should such a distribution be made that we have no claim now or in the future against the Trustees as a result of the distribution."*

*Practice Note: If there are multiple assets to transfer, then the initial LOW should be kept simple with the details of the assets to be transferred being dealt with between the Adviser and Trustees after the appointment of the OTAP product as beneficiary. Albeit the LOW should highlight the assets to be poured over so that is clear.*

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